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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Re: Petition for Partial Stay of Rate Regulation Pending Judicial Review

Dear Mr. Caton:

Enclosed are the original and 14 copies of the above-captioned Petition for filing. We have also enclosed a copy with a self-addressed stamped envelope and request that a file-stamped copy be returned to us.

The prompt dissemination of this information to the Commissioners and appropriate staff members is greatly appreciated.

If you have any questions or comments, please call us.

Very truly yours,

HOWARD & HOWARD

Eric E. Breisach

Enclosures
cc: Mr. David D. Kinley
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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	MM Docket No. 92-266
The Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

PETITION FOR PARTIAL STAY OF RATE REGULATION PENDING JUDICIAL REVIEW

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Rate Regulation	)	

PETITION FOR PARTIAL STAY OF RATE REGULATION PENDING JUDICIAL REVIEW

The Small Cable Business Association ("SCBA"), through its attorneys, Howard & Howard, hereby respectfully requests that the Commission stay certain portions of the rate regulations as they affect certain small systems and small cable operators pending judicial review of the Commission's regulations with respect to these small operators and systems.

SUMMARY

Several smaller cable operators have filed a *Joint Petition For Review* with the United States Court of Appeals for the District of Columbia.[1] Such challenges have previously been within the exclusive domain of much larger cable operators. SCBA is concurrently filing a *Motion For Leave To Intervene* in the judicial challenges.

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[1]*See*, e.g., *Joint Petition For Review* filed by Benchmark Communications, L.P., et. al. on June 14, 1994, D.C. Cir. No. 94-1445, seeking review of the Commission's *Second Reconsideration Order* in MM Docket No. 92-266.

If the Commission fails to grant the relief requested in this *Petition*, SCBA plans, prior to the end of the July 14, 1994 refund liability deferral period, to seek a judicial stay of certain regulations at least as they pertain to the rates charged by smaller cable operators. The Commission has adopted special provisions for two tiers of small cable operators. These definitions, however, are insufficiently inclusive and were promulgated in complete disregard of the procedures mandated by Congress in the Small Business Act.

The Commission has reached the conclusion in its rulemaking that the full rate rollbacks for small cable operators and certain small systems cannot be currently justified pending the completion of the cost study phase of the rulemaking. By defining small businesses too narrowly, however, it has excluded operators who should be entitled to transitional relief.

The Commission's definition of 15,000 subscribers is less than half the subscriber equivalent of the current United States Small Business Administration definition.[2] Furthermore, the overly stringent qualifiers[3] placed on systems with 250,000 or fewer subscribers disqualifies 85 percent of those companies from relief. Only 16 of the 106 companies with between 15,000 and 250,000 subscribers are eligible for relief.[4]

The Commission has also violated provisions of the Regulatory Flexibility Act. Both SCBA and the United States Small Business Administration Office of Advocacy proposed various

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[2]The current SBA size definition includes an operator with $11 million or less in gross annual receipts, which equates to approximately 32,000-38,000 subscribers. 59 Fed. Reg. 16, 513 (April 7, 1994).

[3]To qualify for relief, companies must have average system sizes of 1,000 or fewer subscribers and may have no systems with more than 10,000 subscribers. 47 C.F.R. §76.922(b)(5).

[4]A.C. Nielsen Cable Online Data Exchange database (June 1994).

alternative and less burdensome regulatory methodologies for small businesses. The Commission simply ignored alternatives that were proposed on the record, and made no legitimate effort to explain why they could not be adopted. Such an explanation, however, is required by the Regulatory Flexibility Act.

Because the Commission failed to follow federal law in the promulgation of these regulations, all regulations requiring an additional rollback of rates in this Docket No. 92-266 should be immediately stayed. Rollbacks which SCBA requests be stayed include those promulgated in the *Second Reconsideration Order* and any future application of the May 3, 1993 *Rate Order* to systems that have not yet been required to justify pre-May 15, 1994 rates pursuant to the *Rate Order*.

SCBA raised concerns about the Commission's need to comply with the Small Business Act in *Comments* filed with the Commission on August 30, 1993. These concerns were also raised by the United States Small Business Administration in *Comments* filed August 25, 1993. The Commission chose to ignore these concerns and failed to comply with the Small Business Act. The Commission's action, which results in rules that fail to provide adequate protection to small operators, leaves SCBA no choice but to seek judicial intervention.

I. INTRODUCTION

The Small Cable Business Association ("SCBA") is a self-help group formed by small cable operators faced with an unprecedented labyrinth of overwhelming regulations. SCBA's primary purpose is to help small operators learn, understand and implement the new requirements.

SCBA is barely one year old. Several small operators decided to meet in Kansas City on Saturday May 15, 1993. Word of the meeting spread and one hundred operators attended. The Small Cable Business Association was formed by the end of the day.

From these simple beginnings, SCBA has rapidly grown to over 300 members. More than half of them have fewer than 1,000 subscribers in total. SCBA continues its mission to educate and assist small operators using unpaid, volunteer leadership. SCBA has also been very active in the rulemaking process in this Docket.

II. THE SMALL BUSINESS DEFINITIONS ARE AN ESSENTIAL ELEMENT IN THE COMMISSION'S RATE REGULATIONS BUT WERE PROMULGATED BY THE COMMISSION IN VIOLATION OF THE SMALL BUSINESS ACT.

In its continuing efforts to implement rate regulation mandated by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), the Commission issued its *Second Report and Order on Reconsideration*, MM Docket No. 92-266, FCC No. 94-38, Released March 30, 1994 ("*Second Reconsideration Order*"). In this *Order*, the Commission established different rate standards and procedural options for two different classes of small cable operators. The first is for companies with fewer than 15,000 total subscribers.[5] The second is for systems with 1,000 or fewer subscribers that are owned by multiple system operators ("MSO") with 250,000 or fewer total subscribers.[6]

[5]47 C.F.R. Section 76.922(b)(4).

[6]47 C.F.R. Section 76.922(b)(5).

A. The Commission Established Small Business Definitions In Violation Of Federal Law.

The establishment of company size standards in the manner that the Commission used in this proceeding is violative of federal law. Congress created specific procedural requirements that must be followed whenever an administrative agency establishes a definition of small businesses.

1. Small Business Definition

As the Commission is aware, Congress has generally defined a small business as one which is: (1) independently owned and operated; and (2) not dominant in its field of operation.[7]

2. The Small Business Act Provisions Apply Because Most Cable Operators Do Not Have National Dominance.

The Commission has generally determined that both cable television operators as well as telephone companies were not subject to the provisions of the Small Business Act since they were in many cases the exclusive provider of services and, if not exclusive, at least dominant.[8]

The Commission has previously used a local measure to determine dominance. In the recently promulgated regulations, however, the Commission applied a national test (i.e., aggregate subscribership) in determining dominance to establish the regulatory burden to be placed on cable operators. Since the cable industry on a national level is dominated by a few

[7]15 U.S.C. §632(a).

[8]*See*, e.g., *Report and Order*, in the Matter of Regulation of Small Telephone Companies, CC Docket No. 86-467 (Released June 29, 1987) 2 FCC Rcd. Vol. 13 3811 at 3815.

large MSOs,[9] the cable operators impacted by the size definitions are simply not dominant when viewed on a national basis. Therefore, the provisions of the Small Business Act apply to the instant rulemaking.

3. The Commission Has Not Complied With The Procedural Requirements Of The Small Business Act.

Prior to the enactment of the Small Business Credit Enhancement Act in 1992, §3(a) of the Small Business Act defined a small business as one that was independently owned and operated and not dominant in its field. The Act also authorized the Administrator of the Small Business Administration ("SBA") to promulgate size standards for various classes of businesses in order to carry out the purposes of the Small Business Act.[10] Under the Act and these size standards, federal agencies were at liberty to craft their own size standards for compliance with the Regulatory Flexibility Act,[11] or for any other specific regulatory purposes. Thus, under previous versions of the Small Business Act, the FCC could have defined a small cable operator

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[9]The largest 25 MSOs currently service approximately 80 percent of homes receiving cable. According to *Cable Television Developments*, published by the National Cable Television Association (April 1994) at p. 14-A, the largest 25 MSOs provide service to 44 million homes, at p. 13-A, representing approximately 80 percent of the homes with basic cable service. This percentage is consistent with the Commission's own fact finding in 1990 that the largest 25 MSOs had a total industry share of 79.58 percent. *Report*, In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600 (Released July 31, 1990)("Cable Competition Report"). Even within this group, the 5 largest MSOs currently serve approximately 27 million subscribers, or 49 percent (including the pending acquisitions of Times Mirror by Cox Cable and Maclean Hunter by Comcast). Operators smaller than the ten largest MSOs serve less than one or two percent of the national market individually.

[10]Those size standards can be found at 13 C.F.R. §121.601.

[11]5 U.S.C. §§601-12.

for purposes of regulatory relief without regard to the SBA's size standards prior to September 4, 1992.

The President signed the Small Business Opportunity and Credit Enhancement Act[12] into law on September 4, 1992. This law amended §3(a) of the Small Business Act and mandated that the SBA's size standards were to apply to fulfill the purposes of any other statute in addition to the Small Business Act. The Amendments provided two exceptions: (1) if the other statue provides a different small business definition, such as the Family and Medical Leave Act of 1993 (small business less than 50 full-time employees); or (2) the head of the agency determines that the size standards promulgated by the SBA are inappropriate for a particular regulatory program and follows the procedures set forth in the Small Business Act for crafting a different definition of small business.

In the instant case, the 1992 Cable Act did not contain a small business definition. In fact, the only size definition it contained was to define a small system as one with 1,000 or fewer subscribers.[13] Since system size is a local measure and bears no necessary relationship to company size,[14] the quantification of a system size standard does not establish a small business definition in the 1992 Cable Act.

The Commission also failed to adopt the SBA's size definition for cable operators. Use of a subscriber number is inappropriate because the amendments to the Small Business Act

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[12]Pub. L. No. 92-366.

[13]47 U.S.C. §543(i).

[14]A cable operator might own a single system with 1,000 or fewer subscribers, or a large multiple system operator with 5 million total subscribers might own a system with 1,000 or fewer subscribers.

require adoption of a gross revenue size standard for non-manufacturing businesses.[15] The lack of a definition established by Congress in the 1992 Cable Act coupled with the departure of the Commission from the established SBA standard requires the Commission to follow the clear and simple procedures mandated in the Small Business Act. The Commission simply ignored these procedures with respect to the regulation of cable television, although it has curiously begun compliance with the procedures in subsequent non-cable television rulemakings.[16]

The Commission did not issue appropriate notice and comment rulemaking for the establishment of small business definitions. The Commission's *Memorandum Opinion And Order And Further Notice of Proposed Rulemaking*, released August 10, 1993, merely stated that it was considering establishing a limitation on the relief accorded systems with 1,000 or fewer subscribers based on the size of the company that owned the system. It never gave notice of the Commission's intent to establish a separate set of rules for small businesses. Even if the Commission argues that it gave notice and an opportunity to comment, officials at the United States Small Business Administration have confirmed that the Commission has never sought the approval of the Administrator of that agency for any of the small business definitions adopted by the Commission.

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[15]The SBA currently defines a small cable operator as one with annual gross revenues below $11 million. The *Second Reconsideration Order* implicitly acknowledges the Commission's failure to utilize this definition by noting that systems with 15,000 subscribers earn approximately $3.6 million to $4.5 million from regulated cable service. *Second Reconsideration Order* at ¶ 120.

[16]*See*, e.g., In The Matter of, Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, *Notice of Proposed Rulemaking*, GN Docket No. 94-33, Released May 4, 1994.

B. The Small Business Definitions Were Created To Provide Essential Protection From Rate Rollbacks.

Rate regulation is comprised of two components: (1) initial rate rollbacks to eliminate "monopolistic profits;" and (2) limitations on future rate increases (price caps). The Commission has reached the conclusion that smaller cable operators should be shielded initially from any of the additional rate rollbacks for two reasons.[17] First, the evidence on the record indicates that smaller operators may have lower-than-average margins, suggesting that they earned a lower level of (or no) monopoly profits. Second, the Commission was "concerned that some small operators may not have the financial wherewithal to withstand the impact of a significant reduction."[18]

1. Qualification As A Small Business Was Designed To Provide Interim Transitional Relief.

The regulations promulgated by the Commission in the *Second Reconsideration Order* required most operators to roll rates back to full reduction levels (i.e., 17 percent below the

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[17]The Commission stated in the *Second Reconsideration Order* at ¶118 (emphasis added):

> First, evidence submitted by petitions in this proceeding suggests that smaller systems may face higher than average costs [citations, including to SCBA comments are omitted]. This evidence is insufficient to allow us to conclude that all small systems face systematically higher costs due to the absence of industry-wide cost data. The information in the record, nonetheless, raises a legitimate question as to whether some systems (and operators) with a limited subscriber base do in fact have unusually high costs (and thus lower-than-average margins). In addition, we are concerned that some small operators may not have the financial wherewithal to withstand the impact of a significant rate reduction. We therefore believe that it is appropriate to study the costs of small operators, and compare those costs with the prices they charge for regulated services and equipment, before requiring them to reduce their rates to the full reduction levels.

[18]*Second Reconsideration Order* at ¶118.

rates charged on September 30, 1992). This amended a maximum 10 percent reduction from the September 30, 1992 rates as part of the Commission's *Report and Order* released May 3, 1993. Three classes of systems were identified for "transition" treatment in the *Second Reconsideration Order*, meaning that the full reduction need not be taken immediately, pending the completion of an industry cost study.[19]

The transition relief classifications were for "low cost systems," those whose benchmarks are above full reduction rates;[20] "small operators," those systems owned by companies having fewer than 15,000 total subscribers;[21] and "small systems" owned by small multiple system operators.[22] Although small systems and operators are not precluded from seeking "low cost system" treatment for a particular system, only the latter two methodologies were crafted specifically for smaller systems and operators. Each methodology is described below.

a. Low Cost Transition Relief

If an operator's benchmark rate, as derived by the Commission's formula, is above the full reduction rate, the operator need only reduce its current rate to the benchmark level, deferring the remainder of the reduction until completion of the cost study. This methodology seldom provides protection for smaller systems and operators because the design of the benchmark system results in lower rates for smaller systems and operators than for larger ones.

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[19]*See*, e.g., *Second Reconsideration Order* generally at ¶¶117 - 131.

[20]47 C.F.R. §76.922(b)(4)(B).

[21]47 C.F.R. §76.922(b)(4)(A).

[22]47 C.F.R. §76.922(b)(5).

In addition, a number of factors which significantly increase the amount of the benchmark rate are typically not found in smaller systems and operators.[23]

(1) Small Operator Transition

The Commission defined small operators as those with 15,000 or fewer subscribers.[24] The Commission established this definition with no support[25] for its rationale for selecting the 15,000 subscriber number.[26] These small operators are entitled to avoid any addition rollbacks from their March 31, 1994 rates.[27]

(2) Small System Transition

Congress mandated that the Commission reduce the administrative burdens on small cable systems.[28] The Commission also determined that such systems should not be required to roll rates back by the full reduction rate at the current time.[29] To qualify, according to the

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[23]For example, independently owned systems have much lower rates than MSO owned systems, smaller operators typically operate in more rural areas with lower median household income amounts, smaller operators have fewer systems, and smaller systems and operators frequently did not charge separately for remote controls or tier changes (assuming an operator had more than just a basic tier), all of which reduce the amount of the benchmark rate.

[24]47 C.F.R. §76.922(b)(A).

[25]The Commission merely relies on its "beliefs" without citing any factual basis on the record to support the "beliefs." *See, Second Reconsideration Order* at ¶120.

[26]*Second Reconsideration Order* at ¶120.

[27]This does not allow operators to avoid the rate regulations promulgated and complied with by the operator prior to the *Second Reconsideration Order* which could result in a rollback of at least 7 percent (i.e., a 10 percent rollback less a 3 percent inflation adjustment).

[28]47 U.S.C. §543(i).

[29]*Second Reconsideration Order* at ¶209. The full reduction rate is 17 percent less an inflation adjustment of 3 percent (a net of 14 percent). Qualified small systems need only reduce (continued...)

Commission, however, the system must be owned by an MSO that has an average system size of 1,000 subscribers or less and has no single system with more than 10,000 subscribers. SCBA has determined that for operators with more than 15,000 subscribers (who qualify for small operator transition treatment), only 16 of 106 possible MSOs meet the strict qualifiers imposed by the Commission.[30] Therefore, even though the Commission established a class entitled to relief, it defined the group so narrowly as to exclude 85 percent of such MSOs.[31]

2. Qualification As A Small Business Will Continue To Be Important In the Commission's Final Rules.

The Commission is preparing to undertake a cost study in which it will determine the appropriate level of initial rate reductions, if any, which must be undertaken by small systems and operators.[32] The Commission stated that future relief from the full reduction rates will be limited to the groups of systems and operators that currently qualify for transition relief.[33] Consequently, classification as a qualified small system or as a small operator will govern the

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[29](...continued)
rates from current levels. Full reduction rates often require the loss of rate increases implemented in the normal course of business during the period October 1, 1992 through April 5, 1993 (the beginning of the rate freeze). Therefore, full reduction rates frequently require more than a 14 percent net rollback.

[30]SCBA has gathered this information from a review of the Nielsen database of cable operators and systems.

[31]It is important to note that Congress' statutorily-imposed mandate to provide relief to small systems demonstrated no intent to qualify relief given to a small system based on ownership of the system. Therefore, transitional relief should be provided for all small systems, regardless of whether those systems are owned by a small MSO.

[32]*Fifth Notice Of Proposed Rulemaking*, MM Docket No. 92-266 at ¶254.

[33]*Id.* "Accordingly, we are here providing notice that we will establish further requirements concerning permitted rates for systems currently eligible for transition treatment."

substantive rate that such operators or systems may charge in the future, even after the termination of transition relief.

C. The Commission's Failure To Explain Why It Did Not Adopt Less Burdensome Regulatory Methods Contained In The Record Violated The Regulatory Flexibility Act.

In order to protect small business from unnecessarily burdensome regulation, Congress required that an administrative agency, such as the Commission, perform a "regulatory flexibility analysis" to ensure that the impact on small businesses has been minimized. The law states:[34]

> Each final regulatory flexibility analysis shall contain...(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

In the instant rulemaking, SCBA and the United States Small Business Administration Office of Advocacy have made numerous filings, each of which suggested significant alternatives. For example, the Office of Advocacy suggested that the Commission develop benchmark standards tailored to operator size. The Commission has made no real effort to explain why this approach was not adopted.

The Commission also claims that it has accommodated the concerns addressed in the rulemaking by adopting a "more sophisticated economic model from among a number of statistical options to recalculate the competitive differential, and has reconsidered the benchmark approach such that all regulated cable systems will be required to establish rates based on the revised competitive differential."[35] The Commission asserts that the adoption of a revised

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[34] 5 U.S.C. §604(a).

[35] *Second Reconsideration Order* at ¶261.

"economic model" (i.e., benchmark formula), which substantially reduced the rates that smaller operators and smaller systems could charge as compared to larger operators and systems, has benefitted small operators and systems. The Commission's logic collapses in self-contradiction.

III. THE COMMISSION MUST STAY A PORTION OF ITS RATE REGULATION RULES.

A. The Stay Requested

The Commission must fashion a stay tailored to protect the interests of as many small systems and small businesses as practicable until the Commission's definition of each can be properly promulgated, and presumably expanded to include those systems and operators that are legitimately entitled to less burdensome regulation.

The purpose of the stay is to maintain the status quo pending identification of the systems entitled to less burdensome regulation. The Commission has noted that many small operators cannot afford to reduce rates by the full competitive differential, and that it will be initiating cost studies to determine the proper competitive differential to be applied to these small operators. In addition, until the Commission has, in fact, properly identified the class, the only alternative it may have is to stay the regulation for all operators. To meet these ends and maintain the status quo the stay must, therefore, contain two components. First, no additional rate rollback should be required of any operator pursuant to the *Second Reconsideration Order* until the Commission complies with federal statute and properly defines which operators are "small" and entitled to particularized relief. Second, an operator which has not already been required to justify rates pursuant to the May 3, 1993 Rate Order should not now be required to do so until

the cost study defining an appropriate competitive differential is completed.[36] At an absolute minimum, in the alternative, the stay should be applied to systems owned by an MSO with 250,000 or fewer subscribers.[37]

SCBA, therefore, petitions for a stay of all regulations requiring an additional reduction in an operator's rates promulgated by the Commission under this Docket 92-266. The Commission has already accorded this protection to all systems with 1,000 or fewer subscribers that are owned by a small operator (15,000 or fewer subscribers).[38] The system size is not, however, the sole controlling factor. Small businesses that have systems larger than 1,000 subscribers are entitled to the same level of protection.

B. Granting Of This Stay Request Satisfies The Commission's Standards.

The Commission has granted stay requests that satisfy each of the following elements:[39] (1) that the petitioner is likely to prevail on the merits; (2) that the petitioners will suffer

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[36]This latter element of an appropriate stay is the natural conclusion of the Commission's recent acknowledgment that additional cost studies need to be conducted in order to determine an equitable competitive differential for small and low cost operators.

[37]SCBA notes that it is not in a position to define what size company should qualify for protection; such an answer can be reached only by accepting the SBA's established guidelines or after sufficient opportunity for comment during rulemaking. Therefore, rate regulation should arguably be stayed for all operators. SCBA suggests that the 250,000 subscriber limit may be considered for the purpose of a stay because the definition is believed to be sufficiently inclusive to involve all small operators and because this figure has been previously used by the Commission to fashion rules.

[38]These systems had not been subject to regulation prior to May 15, 1994, so their rates had not previously been rolled back. These systems are allowed to continue charging the rate in effect on March 31, 1994 plus certain price cap adjustments pending completion of the cost study. These systems have, by design of the Commission's regulations, been exempted from the any rate reductions.

[39]*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C.Cir. 1985).

irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay. Each will be analyzed separately below.

1. Likelihood Of Prevailing On The Merits

The Commission's violation of the Small Business Act is clear. The Commission, at a minimum, did not seek the approval of the Administrator of the Small Business Administration prior to adopting small business definitions. This failure, coupled with other substantive and procedural violations of the Small Business Act as well as violations of the Regulatory Flexibility Act, results in a virtual certainty that SCBA will prevail on the merits.

2. Irreparable Harm

Although the type of harm involved is largely monetary, it is irreparable in that no party can be held accountable to make the cable operator whole when SCBA prevails. If operators are forced to reduce rates and possibly refund prior charges, and SCBA prevails, neither the Commission nor local franchising authorities are liable to make individual cable operators whole. It is not possible for small operators to retroactively bill such amounts to subscribers. Therefore, their permanent financial loss constitutes irreparable harm.[40]

[40]SCBA recognizes that monetary losses alone are not ordinarily considered sufficient grounds for a stay; this situation is unique, however, because there is no opportunity for a cable operator to recover damages when successful. In addition to unrecoverable pecuniary losses, cable operators face the potential of significant losses in business reputation resulting from the threatened ability to continue delivering the same quality and quantity of services. Rate regulations may also be considered such a change in circumstances that operators will challenge franchise agreement provisions requiring support of PEG channels and I-nets.

Many small cable operators and operators of small systems have consistently earned below-average margins.[41] These operators faced significant cost increases over the duration of the rate freeze[42] without the ability to increase rates. Many of these operators are now required to reduce, or further reduce, certain rates. Many smaller operators and operators of small systems are in technical default of their loan obligations. Some are in payment default. At least one SCBA member (Green River Cable TV in Russell Springs, Kentucky) has filed bankruptcy. Without the stay, more small operators and operators of small systems will face either foreclosure by lenders and/or bankruptcy, thereby resulting in irreparable harm.[43]

3. Other Interested Parties Will Not Be Harmed

The parties most affected by the implementation of rate regulation are the cable operators and subscribers. The regulators (i.e., franchising authorities and the Commission) are not harmed by the grant of a stay. The Commission retains its rate regulatory power. It must simply exercise such powers in accordance with federal law. The ability of franchise authorities to regulate rates for certain systems would be temporarily delayed. The considerations involving regulators, however, simply do not translate into severe harm. Consideration of subscriber's interests, although a more difficult exercise, also balances in favor of the stay. Many operators with over 15,000 subscribers who are facing full rate reduction are confronted with the choice

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[41]The Commission even acknowledges that this may be accurate. *See*, e.g., *Second Reconsideration Order* at ¶118.

[42]The Commission imposed a rate freeze beginning April 5, 1993 and, following multiple extensions, ending May 15, 1994.

[43]Although SCBA is not in a position to reveal specific operators' identity on the record, SCBA has personal knowledge of financial difficulties faced by many of its members where the difficulties have arisen solely from the Commission's rate regulations.

of reducing, or even discontinuing, service. Subscribers to those systems clearly face irreparable harm. While a stay may prevent the balance of subscribers from enjoying reduced rates as quickly as they may have otherwise realized, it would be inequitable for the Commission to deny certain operators and their subscribers the ability to enjoy the same quality and quantity of service as previously provided because of the Commission's failure to follow federal law.

4. Public Interest Favors Grant Of The Stay

The public interest requires an administrative agency to follow the laws of the United States when promulgating regulations. This public interest concern, in and of itself justifies an entire stay of the rules.

The Commission's regulation of cable systems attempts to balance the ability of cable operators to earn a fair rate of return as mandated by Congress[44] and to protect cable subscribers from excessive prices. The Commission has already determined that it is in the public interest for small cable operators to defer any additional rollbacks until the cost study is completed. The Commission simply misdefined the group that needs protection.

One of the articulated policy goals in the 1992 Cable Act is to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable system."[45] This, among other policy goals, clearly indicates that it was not the goal of Congress to regulate the rates of small cable operators to the point where reductions of service, foreclosure or bankruptcy result. Therefore, it is in the public interest for

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[44]47 U.S.C. §543(2)(A).

[45]Section 2(b)(3) of the 1992 Cable Act.

the Commission to take appropriate steps to avoid imposing unnecessarily harsh regulations on small cable operators.

Congress has clearly articulated that "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns...."[46] The requirement that the Commission follow certain procedures when establishing small business definitions was created to protect small businesses from improper governmental action. It is in the public interest that the small businesses be protected from the effects of improperly adopted small business definitions until the proper procedures are followed.

Simply staying the effects of any rollbacks ordered in this Docket 92-266 would serve the public interest by ensuring the continued and uninterrupted provision of cable services by small business concerns, many of which are providing services to areas where other service providers heretofore had been unwilling to venture.

CONCLUSION

SCBA and other small operators are seeking judicial review of the Commission's rate regulation. Although the regulations contain certain provisions for smaller operators and operators of smaller systems, the Commission clearly violated federal law by failing to give appropriate notice and comment as well as receive the approval of the Administrator of the Small Business Administration. As a result, the small business definitions adopted by the Commission are too narrowly defined. The only remedy available is for the Commission to stay all regulations requiring additional reductions in rates pending completion of the Commission's cost

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[46]15 U.S.C. §631(a).

study or rules defining small operators which have properly been promulgated pursuant to federal law.

Respectfully submitted,

SMALL CABLE BUSINESS ASSOCIATION

Dated: June 29, 1994

By: _____

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